RECEIVED
NOV 2 0 1995
FEDERAL COMMUNICATIONS COMMISSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-168
Revision of Rules and Policies for the	)	PP Docket No. 93-253
Direct Broadcast Satellite Service	)	

COMMENTS OF THE
UNITED STATES DEPARTMENT OF JUSTICE

Anne K. Bingaman
Assistant Attorney General
Antitrust Division

David Turetsky
Deputy Assistant Attorney
General
Antitrust Division

Donald J. Russell
Michael Hirrel
Kate Balaban
Andrew S. Cowan
Frank Lamancusa

Telecommunications Task Force

Antitrust Division
U.S. Department of Justice
555 4th Street, N.W.
Room 8104
Washington, D.C. 20004
(202) 514-5621

November 20, 1995

IB Docket No. 95-168
PP Docket No. 93-253

TABLE OF CONTENTS

Summary

The United States Department of Justice submits these comments in the Direct Broadcast Satellite auction rulemaking proceeding.

As the Commission recognizes in its NPRM, the MVPD market today is essentially a series of local monopolies controlled by cable television firms. DBS could help to resolve this problem by offering a potentially close substitute for cable. The number of firms that can provide DBS service, however, may be limited. The Department believes that in these circumstances the Commission should act to promote DBS as a competitive alternative to cable. A structural rule will achieve this objective and may do so in a less intrusive manner than the behavioral restrictions proposed in the NPRM. The Department also believes that the Commission should prohibit the acquisition of channels at any of the three primary full-CONUS orbital slots by cable television firms, or by combinations of cable television firms, that control service to a large share of the nation's cable subscribers. Cable firms exceeding the proscribed share could still bid at auction on channels that become available for assignment, but grant of DBS construction permits would be conditional upon divestiture of cable assets.

This rule would prevent DBS spectrum from being assigned to firms that may have greater incentives to use DBS in a way that is less than fully competitive with cable television.

The Department also urges the Commission to adopt rules to prevent

anticompetitive conduct by wholesale DBS providers. In coming years, wholesale DBS service may offer MVPDs an efficient means to expand their channel offerings. To the extent that suppliers of such services are vertically integrated and have market power, they may have the incentive and the ability to harm competition in the separate markets for MVPDs and programming vendors. The Department therefore suggests that the Commission extend the principles of equal access and nondiscrimination, as articulated by Congress in the 1992 Cable Act and by the Commission in its own rules, to providers of wholesale DBS service.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-168
Revision of Rules and Policies for the	)	PP Docket No. 93-253
Direct Broadcast Satellite Service	)	

COMMENTS OF THE
UNITED STATES DEPARTMENT OF JUSTICE

The United States Department of Justice (Department) submits the following comments in the above captioned proceeding. In the proceeding's Notice of Proposed Rulemaking (NPRM), the Commission proposes several measures to promote competition in the market for multichannel video program distribution (MVPD). As one of the Federal agencies responsible for enforcing the antitrust laws and promoting competition, the Department has participated in prior Commission proceedings involving the role of competition in telecommunications. Here, the Department believes that the Commission's concerns and objectives are fully appropriate. In some areas, however, the Commission may want to consider whether its concerns could more effectively be met by more direct measures.

I. The FCC Should Seek To Promote Competition In The MVPD Market

As the Commission notes in its NPRM, "Promoting competition is . . . an important part of our public interest mandate." NPRM, ¶ 33. Indeed, the courts have long held, federal agencies must take into account, among other considerations, antitrust and competitive concerns in determining whether a statutory public interest standard is met. E.g. McLean Trucking Co v. U.S., 321 U.S. 67, 79-80 (1944); Northern Natural Gas Co. v. FPC, 399 F.2d 953, 961 (D.C. Cir. 1968); see also FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978). Promoting competition in the MVPD market is an essential consideration in this proceeding.

The MVPD market today is effectively a series of local monopolies controlled by cable television companies. As the Commission observes in its NPRM, although "MVPDs using technologies other than cable are emerging, local markets for the distribution of video programming remain highly concentrated, with cable systems continuing to have market power." NPRM, ¶ 36. Nationwide, including both areas with cable and those without, cable television firms provide the MVPD service to approximately 90% of all MVPD consumers. 1994 Cable Competition Report, 9 FCC Rcd 7442, 7540 (1994). And, after exhaustive study of the MVPD market, the Commission concluded only a year ago:

> Today, most local markets for multichannel video programming distribution services are supplied by monopoly cable systems. At present, competitive rivalry in most local multichannel video programming distribution markets is largely, often totally, insufficient to constrain the market power of incumbent cable systems.

Id. at 7556.

Because these monopoly cable systems continue to possess substantial market power in the MVPD market, the Commission should seek to ensure that the development of potentially competitive distribution technologies will not be impeded, either by regulatory policy or by the actions of monopoly cable systems. Direct Broadcast Satellite service is one of the alternative distribution technologies that could bring much-needed competition to this market. While it continues to face substantial obstacles to widespread consumer acceptance, DBS uses currently available technology that offers nearly ubiquitous coverage, with sufficient channel capacity to offer service comparable to the services currently offered by cable systems.

DBS service has the potential to be a closer substitute for cable television than does medium power fixed satellite service.[1] DBS's high power transmission enables subscribers to receive its signals with small receive antennas suitable for use in urban and suburban markets, which are almost completely served by cable systems. The lower power transmission of fixed service satellites, and the consequent need for somewhat larger receive antennas, makes fixed satellite multichannel service less competitive in the urban/suburban markets now dominated by cable. On the other hand, the larger receive antennas needed for fixed satellite multichannel service may be less of a disadvantage in rural or outlying areas, which now are less likely than urban/suburban areas to be served

[1] In U.S. v. Primestar Partners, L.P., SDNY No. 93 Civ. 391 (1994), the Department entered into a consent judgment with Primestar Partners, L.P., concerning certain potentially anticompetitive actions by a consortium of cable companies who proposed to provide multichannel video service over a medium power satellite in the fixed satellite service.

by cable.

Thus, the potential of DBS technology as a tool for competition in the MVPD market is critically important. The number of firms who can utilize that technology, however, is limited by the number of available slots. There may be room in the marketplace for viable DBS providers at only three orbital slots. Only three of the currently assigned DBS orbital slots, we understand, can be used to provide strong coverage of the full continental United States. These are the assignments at 119° W, 110° W and 101° W. See footnote 77 of the NPRM. Although the Commission indicates, at ¶ 44 of the NPRM, that full CONUS coverage could be achieved by a DBS satellite at 61.5° W, a satellite operating from that location will transmit only an attenuated signal to the Pacific coastal states. Any firm using this slot would still face the same high start-up costs of other DBS firms, but could expect to attract fewer customers nationwide.

II. The Commission Should Adopt a Structural Approach to Ensuring Competition between DBS and Cable.

As the Commission rightly observes in its NPRM, ¶ 36, "cable operator acquisition of resources that are essential inputs of non-cable distribution technologies . . . may have the effect of further concentrating [the MVPD] market, and further enhancing cable operator market power." In particular, "Failure of DBS systems to provide competition to other MVPD systems will be felt particularly in those markets where a DBS operator may be affiliated with a non-DBS MVPD." NPRM, ¶ 34. The Commission proposes several measures to address this problem. The Commission points out, however, that it is also willing "to revisit the extent to which cable operators may hold DBS permits or make use of DBS facilities." NPRM ¶ 36. It invites comments on "whether a more stringent limitation should be placed on cable operators seeking to acquire DBS licenses or to operate a DBS service, and whether such a limitation should be related to the size of the MVPD involved." NPRM, ¶ 40.

The Commission proposes the following measures: 1) Cable operators may not control or use DBS channels at more than one full-CONUS DBS orbital location; 2) Cable operators may not offer DBS service primarily as an ancillary service to the services of affiliated cable systems, or provide DBS service to subscribers of those systems under terms different from the terms offered to non-subscribers; and 3) DBS operators may not provide transponder capacity to any entity that grants an MVPD an exclusive right to distribute DBS services within, or adjacent to, its service area. NPRM ¶¶ 40, 39, 55 and 56.

The Department fully agrees with the Commission's purpose to promote competition in the MVPD market, and with its recognition that unrestrained control of DBS slots by cable systems may threaten such competition. Firms that own cable systems which have monopoly power in some geographic areas are likely to have different economic incentives than DBS providers who are unaffiliated with cable systems. DBS entrants who are unaffiliated with cable systems can be expected to offer products and set prices in ways that will maximize their profits <u>in the DBS business</u>. A DBS operator affiliated with cable systems, however, is likely to offer DBS products and prices that will maximize its aggregate profits in both DBS and cable. Since such a firm will wish to protect its monopoly profits in the cable business, it could have less incentive to offer DBS service that competes against cable.

An extreme example of such behavior would be for the cable firms to provide grossly inferior DBS service or even no DBS service at all, offering little or no competition to cable. Such extreme behavior may be unlikely in an auction environment. However, there would be a significant risk of more subtle forms of curtailed competition if large cable systems are permitted to control DBS channels. Cable firms in DBS might, for example, primarily offer programming service that does not compete with cable head to head. They might also engage in pricing strategies that are less fully competitive with cable rates.

There may be, as noted above, room in the marketplace for viable DBS providers at only three orbital slots. The Commission's rules will permit a single party to hold all 32 of the channels at each of those slots. Thus, the market could end up with only three DBS providers. Even if only one of those three providers is a large cable firm or combination of cable firms, DBS competition with cable will be significantly reduced. Although the cable/DBS provider might still face competition from two independent DBS providers, the incentives of a cable-controlled DBS firm to restrain output and set higher prices could well reduce the incentives of the other two firms to compete vigorously. Those firms would recognize that they can now set higher prices as well and not lose business to their cable/DBS competitor.

In addition, the Commission's proposed rules would not prevent different cable firms from controlling different DBS orbital slots. One can imagine, for example, the nation's two largest cable firms controlling two DBS slots, and some combination of the remaining cable firms controlling a third slot. If there are only three viable DBS slots, all three would then be controlled by cable firms. Competition among DBS providers inter se would in that case likely be dramatically reduced. All would be engaged in essentially the same profit maximizing strategies, the effect of which would be significantly less competition in the MVPD market.

The risk to competition in allowing large cable television firms to become DBS providers is particularly illustrated at the local level. Although DBS is a nationwide service, its marketing, installation and service infrastructure are still based within local markets. DBS competition with cable in those respects is still carried out at the local level. DBS providers controlled by large cable firms are less likely to compete vigorously at this level with their own cable television systems. A single cable television firm may, for example, completely dominate provision of MVPD service in a metropolitan area. After it completes its pending purchase of Viacom's cable systems, for example, Tele-Communications, Inc. (TCI), will control service to approximately 90% of the cable subscribers in the San Francisco television market, 90% in the Seattle market, and 60% in the Portland market. Broadcasting & Cable, July 31, 1995, p. 28. A cable firm which dominates a local market to this extent would be in a position to discriminate in the provision of DBS service to that market. For example, the Commission's proposed rules would not prohibit a cable/DBS provider from charging higher prices to DBS customers in areas where that provider offers cable service.

The impact on MVPD competition of cable entry into DBS depends, of course, upon the size of the cable firm. A cable firm with a small fraction of the nation's cable subscribers will have relatively little to gain from employing DBS strategies designed to shelter its monopoly profits in cable. Any effort by it to restrain DBS output or to set higher DBS prices may cause it to lose more in nationwide DBS revenue than it would retain in sheltered rents from its cable subscribers. For that reason, a rule that would allow the control of DBS channels by such smaller cable firms, e.g., individual firms with fewer than 10% of the nation's cable subscribers, likely would not entail undue risks to competition. However, a very large cable firm, or combination of firms, will have strong incentives to use any DBS license in ways that would not undermine monopoly cable profits.

For these reasons, the Department believes that the Commission should consider a simple, structural, approach to achieve its goal to promote competition in the MVPD market. In contrast to such a structural approach, the alternative measures proposed by the Commission may actually be more intrusive than is necessary to achieve the goal of vigorous MVPD competition. Relatively little would be gained, for example, by imposing behavioral restrictions upon small cable television firms. Those firms have relatively little incentive, for example, to make programming choices designed to protect their local cable systems. Similarly, if the Commission's proposed behavioral restrictions deter even large cable firms from using non-CONUS orbital slots that might otherwise lie fallow, those restrictions may prevent transactions that are economically beneficial.

In other respects, the Commission's proposals may not be strong enough. They will still permit large cable firms to control all of the channels at any of the three orbital slots most likely to be used for DBS service. Although the proposed behavioral restrictions are certainly aimed at some of the behaviors that could occur, they cannot anticipate all forms of economically inefficient behavior by firms whose returns will be maximized by such behavior. To ensure that such behavior does not occur, a structural solution is needed.

The Department believes that the Commission should adopt a simple structural rule which prohibits cable firms above a specified size from owning, controlling or using DBS channels in any of the three primary (101° W, 110° W, and 119° W) full-CONUS orbital slots. The level at which such ownership, control or use would be prohibited should be based upon the percentage of the nation's cable subscribers whose cable service is controlled by the firm. When a combination of cable firms seeks to own, control or use DBS channels, their percentages of nationwide cable subscribers should be aggregated, because collectively these firms will have essentially the same incentives as a single large firm. The rule would govern all future acquisitions or uses of affected DBS channels, including acquisitions in both FCC auctions, purchases of stock or assets of DBS firms, or other arrangements.

If the Commission does adopt a structural rule, the rule should not prohibit affected firms from bidding in auctions for DBS channels. Rather, it should condition grant of the DBS permit to any successful bidder upon divestiture of sufficient cable assets to bring the bidder into compliance with the rule. A deadline, such as 12 months from the date of grant, should be imposed for completion of this divestiture. As the MVPD market matures, moreover, the Commission will want to reassess whether the rule remains appropriate.

III. The Commission Should Also Prohibit Discrimination by Wholesale DBS Providers that could Harm Competition in the Markets for MVPDs and Video Programming Vendors

In ¶ 62 of its NPRM, the Commission seeks comment on whether it should adopt rules requiring that wholesale DBS services provided to cable operators be provided to competing MVPDs on nondiscriminatory terms and conditions. The Department shares the Commission's concern that a wholesale DBS provider with market power might harm competition in the MVPD market if that provider is affiliated with one or more MVPDs.[2] In addition, the Department is concerned

[2] The Department also acknowledges the Commission's concern, as articulated in ¶¶ 61 and 62 of the NPRM, that a DBS provider could obtain a cost advantage over rival DBS providers by offering wholesale DBS service. A firm that uses the same facilities and satellites to provide retail and wholesale DBS service may indeed enjoy cost advantages over DBS firms that only sell retail. The Department believes that such dual distribution is efficient and

that a wholesale DBS provider with market power and affiliated with one or more programming vendors might also harm competition in the programming vendor market. For these reasons, the Department recommends that the Commission adopt a rule to protect against any such abuse of market power. This recommendation is based upon analysis of the product market, the barriers to entering that market, and upon the small number of potential entrants.

1. Product Market

Wholesale DBS service involves the distribution to MVPDs of all or part of a digital DBS video programming stream, as opposed to marketing the DBS signal directly to consumers.[3] MVPDs receiving such service presumably would continue to purchase the actual programming from each programming vendor (e.g. HBO) and not from the wholesale DBS provider. The MVPD (or perhaps the programming vendor) would instead pay the DBS provider for aggregating, digitizing, compressing, encrypting and transmitting the video signals via satellite. The provision of these services, as described below, may result in numerous

---

procompetitive. Nevertheless, if such a wholesale DBS provider is affiliated with programming vendors it may be able to deprive its DBS rivals of the ability to offer comparable wholesale service, with negative consequences for competition in the retail DBS market. The Department believes that the Commission should enact rules to prohibit wholesale DBS firms affiliated with programmers from denying rival wholesale DBS firms access to that programming.

[3] Although analog DBS service, technically speaking, is possible, the high cost of DBS satellite transmission creates strong incentives for DBS operators to use far more efficient digital programming signals. The Department knows of no prospective DBS operators that plan to offer service that is not digital.

benefits for MVPDs.

Existing MVPD providers, seeking ways to offer their subscribers more channels, may seek to employ digital compression technology. When existing analog channels are converted to digital and compressed, as many as six times as many channels might be accommodated within the same bandwidth. For cable operators, digital compression allows expansion of the capacity of an existing system without investing in a costly rebuild of existing cable lines. For MVPD providers which must operate within a finite wavelength spectrum, such as MMDS providers and potentially LMDS providers, digital compression may be the only practical means to expand capacity. Digitizing and compressing analog signals, however, is an extremely expensive process and it is unlikely that any but the largest MVPDs could afford to perform it themselves. Thus, there may be no adequate substitutes for the prepackaged digital video programming that MVPDs will need.

A digital DBS provider might meet this need by choosing to sell its digital signal wholesale to other MVPDs. Because such a provider already has performed the work of aggregating, digitizing, compressing, encrypting and transmitting video signals via satellite, its wholesale DBS service may be the most efficient means for other MVPDs to acquire digital signals. By making this critical supply more affordable, wholesale DBS service may enhance competition among MVPDs. Although it is difficult to predict future demand in this market, various publications have reported that many MVPDs are interested in purchasing wholesale DBS service.[4]

2. Barriers to Entry and Potential Entrants

Several aspects of the market for wholesale DBS services present barriers to entry that will restrict the number of firms that can enter the market.

First, entering this market will be expensive and technically difficult. A firm must build or purchase the ability to collect analog programming signals, convert them to digital signals, digitally compress and encrypt them and uplink them to a satellite. Leasing transponders on a high-power DBS satellite, or launching a proprietary satellite, is also a costly proposition. Put simply, any entry in this market must be comprehensive and on a large scale. The high up-front costs may make it more difficult for a firm to enter the market if it lacks a preexisting base of DBS or cable subscribers.

Second, although retail DBS firms are those most likely to enter the wholesale DBS market, the number of these firms is severely limited by the small number of available DBS satellite slots. Only three DBS orbital locations, each with 32 allocated transponders, can cover the entire continental United States. Because DBS providers will need to offer a large number of channels to subscribers in order to compete effectively, transponder capacity will be a scarce

[4] See, e.g., Kate Maddox, Small Operators Fighting to Keep Up, Electronic Media, June 20, 1994, at 3; Peter Lambert, Wireless Players Study TCI's Headend in the Sky, Multichannel News, April 18, 1994, at 38.

resource even if digital compression is used.[5] The total number of retail DBS providers will therefore remain small.

Third, the first firm to provide wholesale DBS service could enjoy a significant first mover advantage. This is because different DBS providers may employ different encryption technologies, each requiring expensive set-top decoder boxes unique to that technology. To the extent that incompatible technologies are used, the expense of purchasing decoder boxes will tend to lock MVPDs into their initial wholesale DBS provider. This may diminish the base of potential customers for any new entrant. MVPDs will want, moreover, to minimize the risk of being stranded with an inventory of incompatible decoder boxes. For this reason, MVPDs would probably favor the more established DBS providers as demonstrated by a substantial existing subscriber base in retail DBS and in affiliated MVPDs. Conversely, a retail DBS provider may have difficulty attracting MVPDs as wholesale customers if it has recently entered the retail market or has a comparatively small subscriber base. Together, these factors make it more likely that a firm, particularly the first mover, will be able to obtain monopoly power in the wholesale DBS market.

Because finite transponder capacity and the requirement of large-scale entry restrict the potential number of DBS providers, only a handful of firms are likely to be in the business of selling retail DBS. Each of these firms would face barriers to entering the market for wholesale DBS service, especially if one firm

---

[5] See discussion in Section I, supra.

had already established itself in the market.[6] For these reasons, the Department concludes that there is a substantial likelihood that the market for wholesale DBS service will be served by a monopolist for the immediate future. Moreover, even if other firms eventually enter, the market is likely to be very highly concentrated.

3. Competition Concerns

Concentration in the wholesale DBS market may impair competition in the distinct MVPD and video programming markets. Moreover, to the extent that a firm with market power in wholesale DBS is also affiliated with either programming vendors or MVPDs, additional incentives to abuse market power will exist. A wholesale DBS provider with monopoly power would possess a "bottleneck" position in the chain of distribution, since it would provide the link between programming vendors upstream and MVPDs downstream. If it offered the only practical source of digital programming, such a provider could directly exercise monopoly power against firms in downstream markets (i.e. cable, LMDS, MMDS, SMATV, and other MVPDs) and in upstream markets (i.e. programming vendors). The exercise of this market power would ultimately tend to result in fewer options for consumers seeking to purchase subscription television, diminished programming choices and higher prices.

An additional problem exists when a wholesale DBS provider with market

---

[6] Indeed, so far only one firm, TCI, has publicly announced a clear intention to provide wholesale DBS service.

power is also affiliated with one or more programming vendors or with other MVPDs. Such an association may create incentives to refuse to deal, or to deal on discriminatory terms, with competing programming vendors or MVPDs. For example, if a wholesale DBS provider were affiliated with a sports channel, it might refuse to distribute the programming of a competing sports channel, or might offer carriage only on discriminatory terms and conditions. By doing so, the firm would use its market power in wholesale DBS to give its affiliated programmer an advantage in distribution, allowing it to reach more subscribers and increase its revenue, ultimately benefitting the wholesale DBS provider itself.

4. Proposed Rule

In order to address these concerns, the Department proposes that the Commission adopt a Rule that would prevent discrimination by wholesale DBS providers that are affiliated with other MVPDs or programming vendors. Such a Rule should resemble the Commission's rules that prohibit discrimination by MVPDs against programming vendors, 47 C.F.R. § 76.1301(c). The Department believes that the Commission should extend this principle of nondiscrimination to prevent wholesale DBS distributors from discriminating against MVPDs or against video programming vendors.[7] The Department believes that the following

[7] To the extent that a wholesale DBS provider is also retail DBS provider, it would fall under the definition of "multichannel video programming distributor" set forth in 47 C.F.R. § 76.100(e). Although such a provider would be generally subject to the non-discrimination rule established in § 76.1301(c), it is not clear whether this section would encompass discrimination in the provision of wholesale

language, coupled with an administrative review process, would adequately meet these concerns:

> (a) Financial interest. No wholesale DBS provider affiliated with any MVPD or any video programming vendor shall require a financial interest in any MVPD as a condition for delivery of wholesale DBS service, nor shall any wholesale DBS provider require a financial interest in any video programming vendor as a condition for carriage on its wholesale DBS service.
>
> (b) Exclusive rights. No wholesale DBS provider affiliated with any MVPD or any video programming vendor shall coerce or influence any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other wholesale DBS provider.
>
> (c) Discrimination. No wholesale DBS provider shall engage in conduct the purpose or effect of which is to restrain unreasonably (1) the ability of an unaffiliated MVPD to compete fairly by discriminating in wholesale DBS distribution on the basis of affiliation or non-affiliation of MVPDs in the selection, terms or conditions for sale of wholesale DBS service, or (2) the ability of an unaffiliated video programming vendor to compete fairly by discriminating in wholesale DBS carriage on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

As in the case of program access, specific transactions should be exempted from the Rule if the Commission determines that an exemption would be in the public interest. In making its public interest determination, the Commission should consider the impact of the transaction upon the types of concerns it identified in 47 C.F.R. § 76.1002(c)(4). Specifically, the Commission should

---

DBS. In either case, § 76.1301(c) bars only discrimination against programming vendors and not, as the Department considers desirable, against MVPDs as well.

consider the effect of the transaction on the development of competition in the MVPD and video programming markets, on the emergence of competitive non-cable programming distribution technologies, on the attraction of capital investment in the production and distribution of new programming, on the diversity of programming in the MVPD market, and on the duration of the transaction.

The Department believes that this proposed rule will provide important protections to competition in the markets for program vendors and MVPDs, if the market for wholesale DBS service develops in the manner that seems likely today. We also recognize, however, that predictions as to how these markets may evolve are necessarily imperfect, in light of uncertainty about future changes in technology and market forces. For that reason, we recommend that if the Commission adopts the rule proposed by the Department, it should also commit itself to a reexamination of these issues within a reasonably short time frame, e.g., five years, in order to determine whether the public interest would best be served by the continuation, modification, or elimination of the rule.

IV. Other Matters.

At ¶ 30 of the NPRM, the Commission proposes to eliminate rules which permit DBS licensees to use DBS spectrum for non-DBS purposes, but only with substantial restrictions after the first license term. Instead the Commission proposes a rule which would permit, without time limitation, use of some proportion of DBS capacity for non-DBS purposes. The Department supports the Commission's general concept. In general, social welfare is maximized when users of radio spectrum may seek the most economically efficient use of the spectrum. Licensees of DBS spectrum other than large cable firms are likely to find that DBS service is indeed the use of DBS spectrum which maximizes their returns. Thus, strict restrictions on use of DBS spectrum may not be necessary if the Commission adopts a structural rule, such as the one proposed at Section II above, to the extent that the rule governs use of DBS by large cable firms.

At ¶ 42 of the NPRM, the Commission proposes to limit to 32 the number of DBS channels a single entity may be assigned. In general, the Department supports this proposal. A limit of 32 channels will allow a single party to aggregate all the channels at a single orbital slot. Such an aggregation may promote efficient use of the slot and thus promote MVPD competition. The Department shares the Commission's concerns, however, about allowing single parties to acquire channels at more than one orbital slot. For practical reasons, licensees of different channels at single orbital slots may seek to reach mutual accommodations in their use of the slot. See ¶ 40 of the NPRM. A party with channels at more than one slot will thus be in a position to exert substantial influence over the use of several otherwise competitive DBS slots. For reasons identified above, this concern would be particularly acute if the firm with channels at more than one slot were also a large cable firm.

Finally, the Commission proposes, of course, to auction DBS spectrum that becomes available for assignment. The Department supports the concept of auctions. In general, auctions will place spectrum in the hands of firms that place the highest economic value on the license. Structural rules, as suggested above, are an appropriate means of ensuring that a license will not be awarded to a firm that values it, in substantial part, for anticompetitive reasons.

Respectfully submitted,

Donald J. Russell

Donald J. Russell
Chief
Telecommunications Task Force

Antitrust Division
U.S. Department of Justice
555 4th Street, N.W.
Room 8104
Washington, D.C 20001
(202) 514-5621

November 20, 1995